Supreme Court of the United States

1947 TERM

WILLIAM SHAPIRO,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

No. 49

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*, IN SUPPORT OF APPLICATION FOR REHEARING

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
OSMOND K. FRAENKEL,
Counsel.

OSMOND K. FRAENKEL,
C. DICKERMAN WILLIAMS,
Of the New York Bar,
Of Counsel.

Supreme Court of the United States

1947 TERM

WILLIAM SHAPIRO, *Petitioner*, v. THE UNITED STATES OF AMERICA.	No. 49

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*, IN SUPPORT OF APPLICATION FOR REHEARING

The American Civil Liberties Union, which is devoted to the implementation and expansion of the civil liberties guarantees contained in the Constitution, joins with petitioner in requesting this Court to grant a rehearing in this case because it believes that the effect of the case is so far-reaching in its restriction of the privilege against self-incrimination that it warrants reconsideration.

When this Court decided the case of *Davis v. United States*, 328 U. S. 582, the American Civil Liberties Union was concerned with the effect which that case had upon the guarantees against unreasonable searches and seizures contained in the Fourth Amendment, and noted particularly the distinction which the Court then made between public and private papers. We feared that that case might indicate a reversal of the previous trend of this

Court which had been so solicitous of the guarantees contained in the Fourth Amendment.

That decision was carried perhaps a step further in *Harris* v. *United States*, 331 U. S. 145, where again the fact was stressed that the property involved was property which the government had a right to the possession of.

While these cases may have weakened the protection of the guarantee of the Fourth Amendment by permitting seizures without warrant, the impact of the cases was at least restricted to property which was concededly public and not private property. By the decision in the case at bar the impact of those earlier cases is immeasurably extended in the field of search and seizure and the privilege against self-incrimination is to all intents and purposes nullified over the whole area of activities which any agency of government has a right to supervise or regulate.

We join with the dissenting Justices in suggesting that this is a complete change in the position heretofore taken by this Court. As was meticulously pointed out by Mr. Justice Frankfurter, no previous decision of this Court lends weight to the contention of the majority that the records here involved are outside of the protection of the privilege against self-incrimination. It would be a vain labor to repeat his analysis of the decisions relied upon by the majority.

We wish to add only the following observations. We have seen in the past quarter-century a tremendous increase in the areas with which government regulation has concerned itself. This tendency is not likely to be reversed, but on the contrary may be further increased. Obviously it is important in connection with any government agency concerned with regulation of a segment of the life of the people, that means may be readily available to enforce the objective of the legislation which it is

charged with administering. An inevitable step in this direction is the requirement that records be kept. The decision of this Court, while recognizing that there may be a limit to the requirement that such records be kept, makes no suggestion of any criterion for determining when the bounds have been exceeded. To be sure, the opinion indicates that if the purpose to be served by the regulatory law is beyond the power of the legislature, the requirement for the keeping of records does not deprive the keeper of the privilege against self-incrimination. But that is a concession of no consequence since obviously if the purpose is beyond the legislative power the requirement to keep records is likewise without sanction.

We believe that the true criterion for determination as to what records are beyond the protection of the privilege against self-incrimination must be found in a consideration of the character of the records themselves. Whenever the records are actually public, that is, commonly open for public use and inspection, then clearly they are not protected. Likewise the same result should follow whenever the records deal with a subject matter which is inherently public, such as those dealing with government property or government activities. It may even be proper to extend this doctrine to businesses which are affected with the public interest in the sense that they may function only as the result of a franchise from the public. It is essentially for this reason that the privilege against self incrimination has never been extended to corporations.

The adoption of the foregoing criteria would, of course, leave within the protection of the privilege records such as those involved in this case, records of a purely private business conducted by a private individual without franchise from the state. To permit this but preserves the

spirit of the privilege against self-incrimination and need not unduly impair the efficacy of the administration of the regulatory legislation.

Most regulatory legislation imposes civil as well as criminal sanctions. With regard to the enforcement of the civil sanctions, the privilege does not stand in any way as a barrier. Modern experience has shown that in many situations civil sanctions prove more effective than criminal ones in the carrying out of reforms. Thus, criminal statutes against racial discrimination have generally proved ineffective, whereas civil proceedings looking toward a cease and desist order have had much greater effectiveness. The most notable instance of the use of this mechanism has, of course, been in the field of labor relations where it has achieved a minor revolution.

In view, therefore, of the far-reaching consequences of the decision in this case and the fact that no previous decision of this Court requires, if indeed it presages, the result here reached, we respectfully join in the application that a rehearing be permitted so that the grave constitutional question can be further and more extensively argued.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
OSMOND K. FRAENKEL,
Counsel.

OSMOND K. FRAENKEL,
C. DICKERMAN WILLIAMS,
Of the New York Bar,
Of Counsel.